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ALEXANDER L. STEVAS,
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NO. 83-205

# In the Supreme Court of the United States

October Term, 1982

CITY OF WAUWATOSA FIRE DEPARTMENT,
*Petitioner,*

*v.*

STANLEY ORZEL,
*Respondent.*

## RESPONSE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Is a municipal employer liable under the Age Discrimination in Employment Act where it fails to factually demonstrate that compulsory retirement of an Assistant Fire Chief at age 55 is reasonably necessary or rationally related to the particular purposes of the entity and occupation in question?

2. Did the Trial Court err in awarding liquidated damages where it found that the Petitioner had actual knowledge that its demand for Orzel's retirement "was in direct violation" of the Age Discrimination in Employment Act?

3. Did the District Court and the Appeals Court err in denying the petitioner leave to raise a statute of limitations defense where the City failed to raise that defense in its pleadings or at trial?

4. May the City of Wauwatosa challenge, in a supplemental petition, Section 28 U.S.C. § 636 which confers judicial power upon the United States Magistrates where it stipulated to the trial being conducted by the specific Magistrate and raises this issue for the first time in a supplemental petition for a Writ of Certiorari, not having raised the issue at trial, on appeal, or in two attempts to seek a rehearing.

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*v.*

STANLEY ORZEL,
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## RESPONSE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable Chief Justice of the United States Supreme Court and the Associate Justices of the Supreme Court of the United States:

Respondent respectfully requests that the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit be denied.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported at 697 F.2d 743 (7th Cir. 1983). It is reproduced in Petitioner's Appendix B (App. p. A-3).

The decision and order of the Magistrate in the District Court was not officially reported. It is reproduced in Petitioner's Appendix C (App. p. A-37).

The decision of the Court of Appeals was entered on January 3, 1983. The Petition for Rehearing was denied on May 12, 1983 (Petitioner's App. p. A-1).

On May 24, 1983 the Court of Appeals denied the City's Motion for leave to file a second Petition for Rehearing. (Respondent's App. A-1).

## STATEMENT[1]

The factual background of this case is set forth at the beginning of the opinion of the United States Court of Appeals for the Seventh Circuit in *Stanley Orzel v. City of Wauwatosa Fire Department*, 679 F.2d 743 (7th Cir. 1983) (Petitioner's Appendix B, p. A-3) and in the unpublished decision and order of the United States District Court for the Eastern District of Wisconsin (No. 79-C-444, August 31, 1981). (Petitioner's Appendix C, p. A-37). The Court's attention is directed to those opinions.

Stanley Orzel was born on October 24, 1923. He joined the City of Wauwatosa Fire Department in 1949 and advanced through the ranks and was appointed Assistant Fire Chief in 1970.

At the time of Stanley Orzel's discharge as a result of his attaining age 55, the City of Wauwatosa was the ninth largest city in the State of Wisconsin. The City maintains three fire stations which are spread out over the City's 13.1 square miles. Orzel was assigned to one of the three fire stations as an Assistant Fire Chief. Contrary to the Petitioner's assertion that Orzel is "usually the first fireman to respond to an alarm"

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[1]The Respondent is compelled to offer his own complete statement of the case as the Petitioner's statement refers to numerous matters outside the record, which, in several instances, are inaccurate.

(Petition p. 2), it is a geographical impossibility for Orzel or any other line officer to be the first one usually to respond to an alarm. In fact, an Assistant Chief does not even respond to many alarms.

Stanley Orzel was mandatorily discharged on December 31, 1978, the year in which he attained the age of 55. Orzel's discharge was accomplished by the use of Wauwatosa City Ordinance Chapter 2.78, *Compulsory Retirement*, which is reprinted, in part, in Petitioner's Appendix B, p. A-74. The ordinance provided for compulsory retirement of protective service employees at age 55. The City ordinance applied across the board and contained no provision for individualized determinations of fitness.

Orzel did not simply retire as claimed by the Petitioner, but actively sought to mitigate his loss by obtaining temporary work as a census taker, seeking employment with the U.S. Postal Service, and continuously checking for employment at the local State Job Service office. Orzel, in his search for employment, faced the difficulties of any 55 year old looking for work outside the realm of his life's avocation.

In December of 1979 the City made a conditional offer to reinstate Orzel subject to his taking and passing a medical exam. Orzel, on the advice of counsel, refused this offer as the City conditioned the offer on a right to reterminate Orzel's employment as soon as it could find some legal authority to do so. Also, the medical exam proposed by the City was itself discriminatory as only new recruits were required to undergo and pass a physical. Orzel was correctly suspicious of the City's motives given the fact that the City had earlier withdrawn a settlement offer which had been accepted by Orzel. Circuit Judge Richard D.

Cudahy, writing for the Seventh Circuit Panel, recognized that the City had not dealt in good faith, stating:

> "Under these circumstances, we do not believe it was unreasonable for Orzel, on the advice of his attorney to refuse the City's conditional offer to return to work." (Slip opinion p.25, Petitioner's Appendix B. p. A-27).

Prior to trial, the City stipulated that Stanley Orzel is "physically and mentally in excellent condition and good health and that no claim is made that he personally is not capable of performing all fire department functions." (Magistrate's decision and order p. 2, Petitioner's Appendix C p. A-37). Orzel was reinstated after the decision (1981) and has since performed his duties capably as Assistant Chief and, on several occasions, as Acting Chief of the Fire Department.

The Magistrate found that Orzel's discharge was an intentional violation of the ADEA and awarded both actual and liquidated damages. The award was reduced by an amount equal to unemployment compensation, retirement benefits and interim earnings. A direct quotation from the District Court decision is helpful in understanding the key factual issue in this case and why the decisions of the Courts below should be given great weight in denying the Petition for Certiorari:

> "Age 55 simply represented the majority viewpoint based on the surveys conducted. It was a convenient age to select and, it was some age, any age, upon which a benefit formula could be structured. *There is not a scintilla of evidence* to relate age 55, as opposed to ages 50 or 60, to the public interest and safety." (District Court opinion at p. 14, Petitioner's Appendix B p. A-53.) (Emphasis supplied).

> "The defendant has failed to establish that age 55 is reasonably necessary to operate an efficient fire department or that all persons within the class would be unable to perform their duties. It is not a BFOQ and defendant has violated the ADEA by forcing plaintiff's retirement at age 55." (District Court opinion at p. 15, Petitioner's Appendix B p. A-55.)

The Magistrate noted that an award of liquidated damages does not automatically flow when a violation of the ADEA is proven and that a "knowing and voluntary" violation of the act is necessary to entitle a party to liquidated damages.

The Trial Court's analysis of the City's "state of mind" was adopted by the Court of Appeals in its opinion and the Court of Appeals' analysis deserves quotation here. Referring to the District Court's decision, the Court of Appeals stated:

> "This reasoning tracks precisely the analysis employed by the court in *Sywock*, see 665 F.2d at 154-56. Next, the magistrate carefully reviewed the legal and factual circumstances surrounding the plaintiff's state of mind at the time the alledgedly discriminatory acts occurred.' *Sywock*, supra, 665 F.2d at 155. The magistrate noted that, prior to the effective date fo the 1978 ADEA amendments (April 6, 1978), section 626 (f) (2) of the Act arguably permitted employers to discriminate on the basis of age if such actions were taken pursuant to the terms of a bona fide retirement plan; in other words, until April 1978, the City's mandatory retirement of firefighters pursuant to the terms of the Wisconsin Retirement Fund was arguably justified under section 626 (f) (2) of the ADEA. The 1978 Amendments, however, clearly and unequivocably removed this exception, and there is ample evidence in the record that the City was

indeed aware of these amendments. The record also discloses that on November 15, 1978, counsel for the plaintiff advised the mayor of Wauwatosa that it was his 'considered opinion after carefully researching and reviewing all prior precedents concerning this issue,' that the City's demand for Orzel's mandatory retirement 'is in direct violation' of the ADEA. Pl. Ex. 2 (letter from plaintiff's attorney to Mayor James A. Benz)."

"Finally, this circuit's decision in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975), also rendered well before the effective date of Orzel's termination, should have alerted the City to the substantial evidentiary foundation necessary to establish a BFOQ defense — a foundation which the City never attempted to develop here." (Slip opinion at p. 28-29, Petitioner's Appendix B, p. A 29-30).

## ARGUMENT

### I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THE APPLICATION OF THE BFOQ DEFENSE.

Section 623 (a) (1) of the ADEA provides that mandatory early retirement is permissable "where age is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business...." The BFOQ exclusion of the ADEA has been applied in a consistent fashion by each Court to which the issued has been addressed. Each district and Circuit Court facing the issue has first noted that the BFOQ is to be interpreted very narrowly and that the burden is on the employer to demonstrate its applicability. *See, e.g. EEOC v. Janesville*, 630 F.2d 1254, 1258 (7th Cir. 1980); *Smallwood v. United Airlines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 2299 (1982);

*Houghton v. McDonald Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977).

In addition, the Department of Labor, the federal agency originally entrusted with the enforcement of the ADEA, and the Equal Employment Opportunity Commission, to whom enforcement responsibilities were transferred in 1979 advocate an extremely narrow interpretation of the BFOQ defense.[2]

The standard to which an employer has been held has been consistently applied by the Circuit Courts of Appeal with only semantical variations. In order to prevail on a BFOQ defense, an employer must show that the age qualification is reasonably related to the "essential operation" of its business and must demonstrate that there is a factual basis for believing that all or substantially all persons above the age limit in question would be unable to effectively perform the duties of the job, or that it is impossible to determine job fitness. *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); *Usery v. Tamiami Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976); *Touhy v. Ford Motor Company*, 675 F.2d 842, 844-46 (6th Cir. 1982); *Stewart v. Smith*, 673 F.2d 485, 491 (D.C. Cir. 1982); *Smallwood v. United Air Lines*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied* 102 S. Ct. 2299 (1982); *Harriss v. Pan American World Airways*, 649 F.2d 670, 676 (9th Cir. 1980); *Houghton V. McDonald Douglas Corporation*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966

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[2] "The concept of a bona fide occupational qualification will have limited scope and application," and "the burden of proof in establishing that (the exception) applies is the responsibility of the employer...(who) relies on it." 29 CFR 860.102(b) (1981) (superceded, September 21, 1981).

(1977). This two pronged formulation of the BFOQ defense tracks, verbatum, with the EEOC standard.[3].

Moreover, this discussion regarding the BFOQ defense must be qualified by the fact that the City offered no medical or scientific testimony whatsoever in support of its BFOQ position. Rather, it relied only upon reports issued by the Wisconsin Retirement Research Committee which pertained to actuarial assumptions regarding a fiscally convenient normal retirement age. As the Seventh Circuit noted, those reports support Orzel's position.

> "As the magistrate found, the reports indicate that the Wisconsin Retirement Funds choice of age 55 as a "normal retirement date" for protective service employees was not based on any scientific or medical data but, rather, was founded upon (1) a concern for public safety based upon the *subjective belief* that the aging process would take its toll particularly quickly on the physical and mental skills of these employees; and (2) the need to have a definite and financially feasible age upon which a retirement benefit formula could be based." (7th Cir. slip opinion at 20, Petitioner's Appendix B, p. 22.) (Emphasis in the original).

Circuit Judge William Pell's concurrence highlighted Wauwatosa's failure to meet its evidentiary burden.

> "As Judge Cudahy's opinion correctly points

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[3]An employer asserting a BFOQ defense has the burden of proving that 1) the age limit is reasonably necessary to the essence of the business, and either 2) that all of substantially all individuals excluded from the job involved are in fact disqualified, or 3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. 46 *Fed. Reg.* 47,727 (1981).

> out, the burden is on the employer to demonstrate that the BFOQ is reasonably necessary to the normal operation of the particular business. This, Wauwatosa despite its protestations to the contrary, simply has failed to do."
>
> "The setting of a retirement age as a BFOQ in certain occupations would seem to be a permissible governmental objective and in the case of firefighters this would relate both to the citizens of the community and the firefighters themselves. Wauwatosa has failed to demonstrate that this age should be 55." (Slip opinion at 32, Petitioner's Appendix P. A-34).

The City's contentions are based on the premise that it need only show that it arrived at a "good faith" judgement concerning the safety of its citizens. By that ambiguous standard, any employer could be excused from compliance and the purposes of the Act defeated.

The City has the obligation of justifying the particular age limit which was adopted. In the words of the District Court, there is virtually no evidence on the record to indicate that the City, in setting age 55 as its compulsory retirement age:

> "...(conducted) the appropriate balancing test that the policy underlining the ADEA requires. Age 55 simply represented a convenient age to select, and it was some age, any age, upon which a benefit formula could be structured." (Decision and Order at 14, Petitioner's Appendix B p. A-53).

The ADEA forbids such arbitrary distinctions based on stereotyped assumptions rather than analysis or determinations based on individual merit. *See, Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 709-710 (1978).

The Petitioner has cited the Supreme Court decision in *EEOC v. Wyoming*, ___ U.S. ___, 75 L.Ed. 2d 18 (1983) to suggest that the standard by which the City should be governed is that which the United States Congress has adopted for Federal Protective Service employees. 5 U.S.C. § 8335. Even prior to the *Wyoming* decision, the Petitioner claimed that 5 U.S.C. § 8335(b), which compels retirement at age 55 for federal firefighters, justifies the City's adoption of an ordinance which forces retirement at that age.

This argument has previously failed to sway the Supreme Court in *EEOC v. Wyoming* and the Courts below in this matter. First, the standard to which the City of Wauwatosa must adhere to is not that which the federal government has adopted for its protective service employees. The standards of scrutiny to be applied to statutes regulating the forced retirement of federal as opposed to state and local government employees differ, since federal protective services are not subject to provisions of the ADEA. It need only show that its actions are rationally related to a permissible governmental objective. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

The appropriate standard to be applied in this matter is that the compulsory retirement scheme be reasonably necessary to the essence of the *Wauwatosa's* objectives, not those of federal agencies. 29 U.S.C. § 623 (f)(1); *Harriss v. Pan American World Airways*, 649 F.2d 670, 677 (9th Cir. 1980).

The opinion of the Seventh Circuit refutes the analogy to federal employees on two grounds. First, the federal retirement statute contains an express provision which allows the head of federal agency to exempt a protective service employee from automatic separation until the employee becomes 60 years of age

when the public interest so requires. 5 U.S.C. § 8553 (b).

> "Thus, unlike the compulsory retirement scheme in place in Wauwatosa at the time of Orzel's termination, the federal retirement scheme expressly allows for individualized determinations of fitness in exceptional cases." (Slip opinion at p. 9, Petitioner's Appendix p.A-11).

Second, in an attempt to use the federal statute to meet its burden of proof, the Petitioner failed to show any similarity whatsoever in the command functions of federal firefighting personnel as opposed to those a surburban fire department.

The burden of demonstrating that there are differences in firefighting in differing cities and services is on the municipal employer who attempts to apply the BFOQ defense.[4] This principle was expressed in *Aaron v. Davis*, 414 F. Supp. 457, (E.D. Ark. 1976):

> "The defendants and intervenors further suggested that the problems and the risks of the firefighter in Little Rock were not substantially different from those of firefighters in smaller cities or large metropolitan areas. On the basis of the evidence, the Court disagrees with this proposition. Although firefighting appears to be a relatively hazardous occupation regardless of the local circumstances, still those local circumstances can materially alter the degree of the hazard and the risks involved."

Further, a reading of the congressional record

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[4]See *Tuohy v. Ford Motor Company*, 675 F.2d 842 (6th Cir. 2), the existence of FAA "age 60 rule" for commercial airline pilots does not establish, as a valid BFOQ, the same retirement age for non-commercial pilots.

which reports the debate from the bill which eventually became 5 U.S.C. § 8335, suggests that it would be naive to think that the separation of federal firefighters at age 55 has any relationship to the ability of federal employees to perform their jobs. The statements of Representatives Gross and Derwinksi during debate demonstrate that the bill was an effort to attain a generous liberalization of retirement benefits for 56,000 federal employees, mostly police or FBI agents.

> "MR. GROSS: Madam Chairman, this is ill-conceived legislation at any point in time. There is no demonstrated need for improving retirement benefits for law enforcement and firefighting personnel, which are already quite liberal." 119 Cong. Rec. (1973), p. 30593.
>
> "MR. DERWINKSI: The package which finally emerged from the committee was conceived as H.R. 2654, a bill that had as its specific purpose a generous liberalization of retirement benefits." 119 Cong. Rec. (1973), p. 30594.

The federal protective service employees lobbied vigorously for the enhancement of retirement benefits.

> "MR. DERWINSKI: I think we have spent so much time hearing from and being pressured by the federal employe organizations that we do not maintain objectivity. I think this is a case of where we have listened to the requests of some of these organizations and we have not kept in mind the impact on the taxpayer which this precedent sets." 119 Cong. Rec. (1973), p. 30595.

The BFOQ standard applied by the District and Trial Courts does not conflict with that of *Hodgson v. Greyhound Lines*, 499 F.2d 859 (7th Cir. 1974), cert. den. 419 U.S. 1122 (1975) or its progeny. Certiorari

should not be granted — there being no conflict between the decisions of this Court and the Circuit Courts of Appeal. Certiorari should not be granted in a case where the Courts below have factually determined that the Petitioner failed to demonstrate *any* "reasonableness" or "necessity" for its discharge of an Assistant Fire Chief at age 55.

## II. NO CONFLICT BETWEEN THE CIRCUITS EXISTS ON THE APPLICATION OF THE UNCOMPLICATED RULE FOR AWARDING LIQUIDATED DAMAGES.

The Age Discrimination in Employment Act, 29 U.S.C. § 626(b), provides that liquidated damages are payable in cases of willful violations of the act. Although the ADEA adopts the enforcement scheme of the Fair Labor Standards Act, decisions under that act concerning liquidated damages are not helpful since the term "willful" is found only in the ADEA.

In *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981) liquidated damages are described as a substitute for punitive damages and are intended to deter intentional violations of the ADEA.

As the ADEA requires a factual demonstration of willfulness, the defense of good faith, recognized under some statutory schemes is not available to the City of Wauwatosa. Such a defense is superfluous. *Wehr v. Burroughs Corporation*, 619 F.2d 276, 280 (3rd Cir. 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 (1st Cir. 1979); *Goodman v. Hueblein, Inc.*, 645 F.2d 127 (2nd Cir. 1981); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176 (6th Cir. 1983); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir., cert. denied 454 U.S. 860 1981); *Syrock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149 (7th Cir. 1981).

There is no inconsistency or conflict between the Circuit Courts in the imposition of the ADEA's sanction of liquidated damages when a "knowing and voluntary" violation of the act is demonstrated. *Syrock v. Milwaukee Boiler Mfg. Co.*, supra.

The only question presented for review is one of fact. The factual issues have been conclusively reviewed by the Seventh Circuit. The award of liquidated damages is premised on the District Court's finding of willfulness. As previously noted, prior to Orzel's discharge, the Petitioner was alerted by Respondent's counsel that its actions were violative of the ADEA. The Petitioner knew or should have known that the 1974 Amendments to the ADEA had been held in *Aaron V. Davis*, 424 F. Supp. 1238 (E.D. Ark. 1976) and *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977) to apply to local governments and their protective occupation employees.

The Petitioner seeks only a factual review of the Seventh Circuit's conclusions that:

> "In light of these factual and legal circumstances, we agree with the magistrate's implicit conclusion that the City knew or reasonably should have known of the requirements of the ADEA and that the City knew or reasonably should have known that its termination of Orzel was inconsistent with those requirements." (Slip opinion at p. 29, Petitioner's Appendix B, p. A-31).

## III. THE PETITIONER'S FAILURE TO RAISE A STATUTE OF LIMITATIONS DEFENSE AT TRIAL CONSTITUES WAIVER.

The petitioner has argued that Orzel did not timely file his discrimination charge with the appropriate administrative agencies and that under *Delaware*

*State College v. Ricks*, 449 U.S.250 (1980) the charge was time barred. The City did not affirmatively raise this point in its answer or in any other pleading. The Seventh Circuit at footnote 8 of its decision (Petitioner's Appendix p. A-8) disposed of this issue. *Delaware State College v. Ricks* was decided two months prior to the commencement of the trial in this matter and two years after Orzel was discharged. The Petitioner has advocated a retroactive application of the *Delaware State College* decision. Both the District and Circuit Courts refused to apply the *Delaware State College* decision retroactively as that intent cannot be properly inferred from the Supreme Court's decision in *Delaware State College v. Ricks*.

## IV. THE PETITIONER MAY NOT, FOR THE FIRST TIME, RAISE OBJECTIONS TO THE AUTHORITY OF A MAGISTRATE TO ACT IN ITS SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI.

Prior to trial in the District Court for the Eastern District of Wisconsin, both parties consented in writing to refer this matter to United States Magistrate Aaron Goodstein for the purpose of conducting trial. The Chief Judge of the District ordered that the action be transferred to Magistrate Goodstein for "all further proceedings." (Respondent's Appendix B, p. A-1).

The case was tried before Magistrate Goodstein in February of 1981. At no time prior to (or during) the trial was an attempt made to withdraw from the Stipulation or to object to the Magistrate's authority. Post-trial arguments were held in July of 1981 and again there were no objections to the Magistrate's authority to act.

The City, as appellant, requested the Seventh

Circuit to review several aspects of this case. No objection to the Magistrate's authority was made in the appellant's brief, reply brief or in oral argument to the Seventh Circuit Panel.

The City filed a petition for rehearing which requested a review of every issue which had been raised on appeal. The Respondent was requested to answer the City's petition for rehearing and each issue was again thoroughly briefed as to current law. No argument was presented at the time of the petition for rehearing which challenged the Magistrate's authority.

After the petition for rehearing was denied, the City brought a motion for leave to file a second petition for rehearing. No objection to the Magistrate's authority was raised in support of this motion.

It is only in the supplement to the petition for a writ of certiorari that the issue of the Magistrate's authority has been raised. This despite the fact that *Northern Pipeline Construction Company v. Marathon Pipeline Company*, _____ U.S. _____, 102 S. Ct. 2858 (1982), upon which the Petitioner relies, was decided on June 28, 1982.[5] *Northern Pipeline* was widely reported in the general media and in professional journals. The Petitioner had the opportunity to inform the Seventh Circuit Court of Appeals that it felt *Northern Pipeline* was relevant to this action prior to the issuance of the Seventh Circuit's decision in January of 1983.

It is widely understood that the extraordinary power of the United States Supreme Court will not be invoked to undertake the review of matters which

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[5]Rule 21 of the Supreme Court rules allows for the filing of a supplemental brief to call attention to "...new cases...not available at the time of the party's last filing."

were not presented to Federal Courts below. *Youakim v. Miller*, 425 U.S. 231, 233-234 (1976); *Walters v. City of St. Louis*, 347 U.S.231 (1954); *New York Dock Company v. The Poznan*, 274 U.S. 117 (1927).

It is only in exceptional cases that the Supreme Court will consider questions not pressed or passed upon below. *Duignan v. United States*, 274 U.S. 195, 200 (1927).

This case does not represent such exceptional circumstances. The Supreme Court has already passed on the inherent constitutionality of the delegation of authority to Magistrates under 28 U.S.C. § 636. *United States v. Raddatz*, 447 U.S. 667 (1980).

Furthermore, on October 3, 1983 this Court declined to grant certiorari in a case which raised the issue of a Magistrate's authority to conduct a civil trial without a de novo review by the District Court. *Western Food Equipment v. Foss America*, (No. 82-2044, CA 9)(Cert. Den. 10-3-83).

Lastly, justice requires that the Petitioner be estopped from raising the issue of the authority of the Magistrate when the Petitioner has consented to such action.[6] The Petitioner has had, over the last few years, many opportunities to raise the issue of the Magistrate's authority and has not done so. It should not be allowed to do so in its petition for certiorari.

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[6]See *Gelfren v. Republic Life Insurance Co.*, 451 F.Supp. 1229 (C.D. CA 1978) and Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y. Univ. L.J. 1297, 1350-1354 (1975).

## CONCLUSION

The only real questions the City of Wauwatosa raises in its petition turn on the particular facts of this case alone. In essence, Petitioner asks this Court to make a third review of the lengthy trial record to see if it can find what two previous courts have been utterly unable to find — some proof that the City did not act intentionally in violating the ADEA. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Moreover, in the realm of factual review and analysis, the rulings of the Courts below are treated with and entitled to great weight. The determinations below constitute a finding of fact, to which the "clearly erroneous" standard applies. *Pullman Standard v. Swint*, 102 S. Ct. 1781, 1788-1981 (1982). In the present case, the Petitioner raises questions turning entirely on the facts of this case, already resolved twice (three times when the Petition for Rehearing is considered) in favor of the Respondent.

None of the questions presented in the Petition for a Writ of Certiorari rise to the "special and important reasons" standard of U.S.C. Rules of Court, Supreme Court Rule 17.

It is respectfully submitted that the petition be denied.

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# APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

May 24, 1983

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

STANLEY ORZEL,

Plaintiff-Appellee,

vs.

No. 8102564

CITY OF WAUWATOSA FIRE DEPARTMENT,

Defendant-Appellant

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Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 79 C 444—**Aaron E. Goodstein**, *Magistrate*

This matter comes before the court its consideration on the following documents:

1. "MOTION FOR AN ORDER GRANTING LEAVE TO FILE A PETITION FOR REHEARING EN BANC" filed herein on May 19, 1983, by counsel for defendant-appellant.
2. "MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE A PEITION FOR REHEARING EN BANC" filed herein on May 19, 1983, by counsel for defendant-appellant.

The decision in this case was issued on January 3, 1983. On January 17, 1983, appellant filed a petition for rehearing. Rehearing was denied on May 12, 1983.

Appellant now seeks leave to file a petition for rehearing **en banc**. Circuit Rule 16 requires that a petition for rehearing and a suggestion for rehearing **en banc** be filed within 14 days of this court's decision. Appellant has failed to cite any authority that would support its request to file its suggestion for rehearing **en banc** outside the 14 day limit and after the court had denied a petition for rehearing. Accordingly,

IT IS ORDERED that appellant's motion for leave to file a petition for rehearing **en banc** is hereby DENIED as untimely.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

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STANLEY ORZEL,

Plaintiff,

vs.

C.A. No. 79—C-444

CITY OF WAUWATOSA FIRE DEPARTMENT

Defendant.

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ORDER

The parties having consented to the exercise of jurisdiction of this action by a magistrate,

IT IS THEREFORE ORDERED that this action may be and hereby is transferred to United States Magistrate Aaron E. Goodstein for all further proceedings.

Date at Milwaukee, Wisconsin, this 6th day of May, 1980.

John W. Reynolds

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JOHN W. REYNOLDS
CHIEF JUDGE